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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-317

WILLIAM J. WOESTENDIEK AND THE COLORADO SPRINGS SUN, INC., *Petitioners,*

v.

WESLEY W. WALKER AND KATHERINE L. WALKER, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioners, William J. Woestendiek, ("Woestendiek") and The Colorado Springs Sun, Inc., (the "Sun") petition for a writ of certiorari to review the decision of the supreme court of the State of Colorado entered on June 3, 1975, affirming a jury verdict which awarded $29,200 compensatory damages and $9,900 in exemplary damages in a libel action against Woestendiek and the *Sun*.

OPINION BELOW

The opinion of the Colorado supreme court, not yet reported, and its judgment are included as Appendix A hereto. Copies of each of the allegedly defamatory publications on which suit was brought are included as Appendix B (Exhibits B-1 through B-3).

JURISDICTION

The opinion of the Colorado supreme court, as modified, was entered on June 3, 1975. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners rely upon rights guaranteed them by the First and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED

I. Is the Colorado supreme court's decision awarding punitive damages against a newspaper and its editor in a constitutional defamation action based on evidence showing only, "[A] wanton or reckless disregard of the rights and feelings of the plaintiffs" reconcilable with *Gertz* v. *Welch,* 418 U.S. 323 (1974), *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) and *New York Times* v. *Sullivan,* 376 U.S. 264 (1964)?

II. Did the Colorado supreme court discharge its constitutional obligation of independent appellate examination of plaintiffs' evidence on actual damages?

III. Is defamation liability based on publication of an opinion editorial and opinion letters to the editor consistent with this Court's decisions limiting liability

in constitutional defamation cases to false statements of fact?

IV. Should this Court permit the individual states to give *Gertz* v. *Welch, supra,* retrospective application?[1]

STATEMENT OF THE CASE

Plaintiffs, who own and operate an antique shop named "Cobweb Antiques" in Colorado Springs, Colorado, brought a libel action against the *Sun,* one of two daily newspapers in Colorado Springs, Woestendiek, its editor, Doyle Trent, a *Sun* reporter, and one Spencer A. Simco, the source of the allegedly libelous information. The jury returned a verdict of $29,200 compensatory damages and $9,900 punitive damages against all defendants. Simco did not appeal. The Colorado supreme court affirmed the judgments against Woestendiek and the *Sun,* but reversed as to Trent.

In late 1971, the vacant home of Mrs. Alter, an elderly woman then living in a nursing home, was burglarized. Plaintiffs bought items stolen from Mrs.

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[1] Each of these questions was presented at one or more stages in the case below. Throughout the trial and the appellate proceedings, petitioners emphasized that liability, (or, after the announcement of *Gertz* v. *Welch, supra,* at least punitive damages), required evidence that they either suspected their sources to be unreliable or were aware of information contrary to that which they published. *St. Amant* v. *Thompson, supra.* Petitioners requested that the jury be so instructed. Petitioners' opening brief to the Colorado supreme court emphasized the duty of independent appellate inquiry. Petitioners' brief in response to the Colorado supreme court's interrogatories concerning the effect of *Gertz* v. *Welch, supra,* expressly discussed the opinion nature of the allegedly libelous publications and the retrospectivity question. Finally, in seeking a rehearing, petitioners raised each of the questions now presented to this Court, among others.

Alter's home without knowledge of the theft. Simco, a friend of Mrs. Alter, later recognized some of the stolen items among the merchandise displayed for sale at the Cobweb as belonging to Mrs. Alter.

When the police were summoned, Mr. Walker cooperated by identifying the sellers. These items were then crated pursuant to a police hold order. However, the district attorney's office viewed the question of ownership as a civil matter and refused to assist Simco in returning the items to Mrs. Alter. Mr. Walker refused Simco's offer of $60 to release Mrs. Alter's property.

Simco then visited the *Sun* and spoke with Trent. Trent's subsequent investigation included discussions with both plaintiffs and an assistant district attorney. Between February 25 and March 2, while Trent was looking into the story, plaintiffs released Mrs. Alter's property for $150. Woestendiek undertook no independent inquiry, instead relying on his reporters, as was the paper's regular practice.

The *Sun* published three articles concerning this matter, two of which were written by Trent (Exhibits B-1 and B-3), and one of undetermined authorship (Exhibit B-2). Woestendiek wrote an editorial generally criticizing the law governing the return of stolen property in his regular column (Exhibit B-4). The *Sun* also published several letters from readers commenting on these events (Exhibits B-5, B-6, B-7 and B-8). Woestendiek was solely responsible for selecting the letters to be published. The publications appeared between February 28 and March 20.

The case was tried to a jury in February, 1973. Following a verdict in favor of plaintiffs, the case was

appealed. It had been argued to the Colorado supreme court when this Court announced its decision in *Gertz* v. *Welch, supra.* On July 17, 1974, the Colorado supreme court requested counsel to file simultaneous briefs concerning, *inter alia,* the appropriate standard of liability in light of the *Gertz* decision, and whether retrospective application should be given a new standard.

The Colorado supreme court ruled that plaintiffs were neither public officials nor public figures, but had become involved in a matter of public or general concern. For such cases it held that a publisher, "[W]ill be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not." The court further adopted "[T]he limitation that 'reckless disregard' for whether or not a statement is true does not mean that there must be a finding that the person making the statement had serious doubts as to the truth thereof." In addition, it expressly approved the trial court's omission of "actual malice" from the jury instructions, and commented, "[T]he term 'reckless disregard' has had rather frequent usage in the tort field in this state." (footnote omitted)

The court reversed the judgment entered against Trent. It reviewed his investigative efforts, noted the only statement unsupported by all the evidence was that the goods had been priced for sale at $2,000 and concluded it could not find evidence to support the conclusion that Trent recklessly disregarded the truth. However, as to Woestendiek and the *Sun,* it ruled:

> We hold that the evidence sufficiently supports a finding of publication of statements by the de-

> fendants, Sun and Woestendiek, with *reckless disregard* as to whether they were true (as to compensatory damages), and, with a wanton or *reckless disregard of the rights and feelings of the plaintiffs* (as to exemplary damages). (emphasis in original)

The court summarized the evidence from which it felt that the jury could have concluded that Woestendiek and the *Sun* had acted recklessly as follows:

> [E]ntitling a published letter. "Black eye for all dealers," which letter stated that the Walkers preferred to resell the articles rather than return them to the rightful owners; publishing letters expressing anger at the law being used to protect the guilty and not the innocent; publishing an opinion that the writer was thoroughly amazed that the plaintiffs would even consider selling merchandise known to be stolen; headlining a letter "State 'fence' paradise"; publishing an opinion that the writer could not do business with one who knowingly sells stolen property; and continuing to publish news articles and letters two weeks after the settlement had been made.

While acknowledging that questions of constitutional fact compelled *de novo* appellate review, as well as evidence of convincing clarity, the court concluded without further analysis:

> This is not a case, however, for us to become a thirteenth juror. We believe there was convincing clarity to the evidence presented by and on behalf of the plaintiff.

REASONS FOR GRANTING THE WRIT

Despite the latitude afforded the individual states by *Gertz* v. *Welch, supra,* in the area of defamation liability involving private persons and matters of pub-

lic concern, this Court has nevertheless held that the First Amendment free press clause prohibits the states from adopting liability without fault and precludes the awarding of punitive or presumed damages unless the *New York Times* v. *Sullivan, supra,* standard has been met. The predictable experimentation among the individual states after *Gertz* v. *Welch, supra,* necessitates this Court's repudiation of the Colorado supreme court's departure from the *New York Times* standard in the remaining protected areas of punitive and presumed damages. In addition, the variation spawned by *Gertz* v. *Welch, supra,* which in the instant case has led to defamation liability for matters of editorial commentary and reader opinion, demonstrates that unless such expressions of opinion are protected, the policies underlying the free press clause will be eviscerated.

ARGUMENT

I. Is the Colorado Supreme Court's Decision Awarding Punitive Damages against a Newspaper and Its Editor in a Constitutional Defamation Action Based on Evidence Showing Only, "[A] Wanton or Reckless Disregard of the Rights and Feelings of the Plaintiffs" Reconcilable with Gertz v. Welch, 418 U.S. 323 (1974), St. Amant v. Thompson, 390 U.S. 727 (1968) and New York Times v. Sullivan, 376 U.S. 264 (1964)?

Once punitive damages have been awarded, as they were in the instant case, the flexibility permitted the states under *Gertz* v. *Welch, supra,* is subordinated to the constitutional requirement that the evidence show "actual malice" within the meaning of *New York Times* v. *Sullivan. supra,* and its progeny. 418 U.S. 323, 350. Nevertheless, while affirming the award of punitive damages, the Colorado supreme court not only approved the trial court's omission of "actual

malice" from the instructions, but also expressly held that in Colorado liability could attach for publication of a statement, "with reckless disregard for whether it was true or not" although the evidence *need not* be sufficient, "to permit the conclusion that the defendant in fact entertains serious doubts as to the truth of his publication."

Thus, without explanation of the constitutional limitation, the jury was instructed:

> [T]he privilege is abused only if the Plaintiffs establish that the publications were false in some material manner and such statements were published with knowledge that they were false or with reckless disregard of whether they were false or not.

In contrast, petitioners requested that their "actual malice" instruction be accompanied by an instruction explaining that the jury must find in their favor if a preponderance of the evidence established:

> [T]hat they published the statements based upon reports which they considered reliable and that they had no information to the contrary . . .[2]

Indeed, plaintiffs did not even introduce evidence from which petitioners' "substantial doubts" as to the truth of the matter published could be inferred.

The Colorado supreme court's decision, which will no doubt influence the paths taken by other states that have not decided a constitutional defamation case since

[2] See *Goldwater* v. *Ginzburg*, 261 F.Supp. 784 (S.D.N.Y. 1966), *aff'd*, 414 F.2d 324 (2d Cir. 1966), *cert. denied*, 396 U.S. 1049 (1967).

Gertz v. *Welch, supra,* has thereby perilously undercut the First Amendment protection afforded publishers. The extent of the Colorado supreme court's departure from a constitutionally permissible standard is evidenced by its explanation that "serious doubts" as to the truth of the publication need not be a definitional component of the "reckless disregard" test, "[S]ince the term 'reckless disregard' has had rather frequent usage in the tort field in this state." The accompanying footnote cites *Cantrell* v. *Forest City Publishing Co.*, — U.S. —, 42 L.Ed.2d 419, 95 S.Ct. 465 (1974). The *Cantrell* decision, of course, provides absolutely no support for this position, since in *Cantrell* Mr. Justice Stewart pointed out that the instructions were not subject to review as no objection thereto had been raised. (Id., —, 42 L.Ed.2d 419, 425, 95 S.Ct. 465, 469)

In several decisions subsequent to *New York Times* v. *Sullivan, supra,* this Court has clarified the meaning of "actual malice" as a First Amendment term of art. This Court explained in *Gertz* v. *Welch, supra,* that "actual malice" does not connote the common law concept of ill will. (Id., 334) Instead, "actual malice" involves a reckless disregard of the truth, which this Court has equated "with subjective awareness of probable falsity." (Id.) See also, *Time, Inc.* v. *Pape,* 401 U.S. 295 (1971); *St. Amant* v. *Thompson, supra.* Indeed, it was the *St. Amant* formulation of reckless disregard which the Colorado supreme court *expressly repudiated.*

Without the *St. Amant* explanation, the reckless disregard standard is certain to fall into the definitional morass of state tort law. The resulting confusion and eventual dilution of this standard will do irreparable

damage to First Amendment interests. The fallibility of reliance upon the common law, (or implied malice), in constitutional defamation cases was recognized by the Massachusetts supreme court in *Stone* v. *Essex County Newspapers, Inc.*, — Mass. —, 330 N.E.2d 161 (1975). The court there distinguished the subjective awareness of probable falsity required by this Court's decisions from the common law objective standard which establishes liability, "[I]f an ordinary normal man under the same circumstances would have realized the gravity of the danger." — Mass. —, 330 N.E.2d 161, 174. See also *AAFCO Heating & Air Conditioning Co.* v. *Northwest Publishing, Inc.*, — Ind. App. —, 321 N.E.2d 580, 589 (1974) ("The formulation of the 'malice' test in *St. Amant* [citation omitted] should provide trial courts with relatively clear guidance.")

Having repudiated this Court's terminology ("actual malice"), as well as its guidance (*St. Amant* v. *Thompson, supra*), the Colorado supreme court then demonstrated the propensity for error inherent in its approach by concluding:

> We hold the evidence sufficiently supports a finding of publication of statements by the defendants, Sun and Woestendiek, . . . with a wanton or *reckless disregard of the rights and feelings of the plaintiffs* (as to exemplary damages). (emphasis in original)

Thus, the standard of liability for punitive damages, which under *Gertz* v. *Welch, supra,* can be no less than "subjective awareness of probable falsity," has fallen below even reckless disregard of the truth. Instead, in Colorado as well as in those states which choose to

follow the instant decision, liability for punitive damages in constitutional defamation cases will be predicated upon "reckless disregard of the rights and feelings of the plaintiffs." The Colorado supreme court could not have more clearly given effect to this Court's fear that without the protection afforded publishers by the *New York Times* standard, juries will "remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz* v. *Welch, supra,* 350.

Not only, then, have Woestendiek and the *Sun* been subjected to liability under a standard which affords far less protection than that enunciated in *New York Times,* but, moreover, the standard is obviously founded upon tort concepts having nothing to do with subjective awareness of probable falsity. The Colorado standard bears suspicious similarity to the State's exemplary damages statute, C.R.S. 13-21-102 (1973), which provides in pertinent part that exemplary damages may be awarded where the defendant's conduct is attended by, "a wanton and reckless disregard of the injured party's rights and feelings." Predictably the Colorado decisions construing this statute and its predecessors, (the "frequent usage in the tort field" to which the Colorado supreme court referred), involve an *objective,* and not a *subjective,* awareness of wrongdoing. See, e.g., *Clark* v. *Small,* 80 Colo. 227, 250 P. 385 (1926).

In addition to engrafting onto the law of constitutional defamation a standard of liability previously unknown to the media, the Colorado supreme court appears to have upheld the libel judgments on the basis of criteria germane only to an action for invasion

of privacy.[3] For example, defendants acted with "reckless disregard of the *rights and feelings* of the plaintiffs" by "continuing to publish news articles and letters two weeks after the settlement had been made." The manifest irrelevancy of such considerations to the issues in a libel action—truth and subjective awareness of probable falsity—is self-evident. Moreover, the holding in *Gertz* v. *Welch, supra,* was expressly limited to publications whose substance "makes substantial danger to *reputation* apparent." (Id., 348, emphasis supplied) Thus this Court has allowed no relaxation of the *New York Times* test where the only apparent danger is to plaintiffs' "feelings."

In conclusion, this Court's recognition that libel judgments offer a vehicle for punishing the exercise of First Amendment rights underscores the need to prevent Colorado and other states from allowing recovery of punitive damages on proof that does not meet the *New York Times* rule, as well as to insist that appellate courts not endorse jury hostility toward publishers of unpopular expressions by predicating defamation liability on mere infringement of plaintiffs' sensibilities.

II. Did the Colorado Supreme Court Discharge Its Constitutional Obligation of Independent Appellate Examination of Plaintiffs' Evidence on Actual Damages?

The decision of the Colorado supreme court sustained a jury verdict awarding compensatory and punitive damages without meaningful examination of

[3] Whether this Court would even tolerate liability for invasion of privacy in an action against the media based on a standard less protective than the *New York Times* rule appears doubtful. Cf. *Cox Broadcasting* v. *Cohn,* — U.S. —, 43 L.Ed. 2d 328, 95 S.Ct. 1029 (1975).

evidence from which the jury could have determined the amount of plaintiffs' *actual injuries* resulting from the publication of a false fact. As a substitute for the constitutionally mandatory analysis, the opinion contains only the laconic comment, "This is not a case, however, for us to become a thirteenth juror." Such rank abdication of responsibility cannot be reconciled with this Court's requirement, iterated and reiterated since the *New York Times* decision, that fact questions inherent in constitutional defamation actions necessitate independent inquiry at the appellate level. See, e.g., *Old Dominion* v. *Austin,* 418 U.S. 264 (1974); *Time, Inc.* v. *Pape, supra; Beckley Newspaper Corp.* v. *Hanks,* 389 U.S. 81 (1967).

In *Gertz* v. *Welch, supra,* this Court recognized the danger that presumed or punitive damages expose publishers to punishment for "expressions of unpopular views", (Id., 350), and prohibited the states from permitting the recovery of presumed or punitive damages when liability is based on a test less protective of publishers than that enunciated in *New York Times* v. *Sullivan, supra.* However, this Court eschewed a precise definition of "actual injury" and did not reassert the requirement of independent appellate inquiry. This omission demands the Court's immediate attention lest other states follow the Colorado supreme court in abandoning their responsibility to safeguard First Amendment interests by independent review of constitutional fact questions, particularly evidence of actual injury.

The flexibility permitted the individual states by *Gertz* v. *Welch, supra,* underscores the necessity that this Court rigorously enforce the requirement of independent appellate examination. Against the backdrop

of possible jury hostility toward publishers, only *de novo* review at the appellate level can insure that juries have abided by their instructions in awarding no more than actual damages suffered unless the evidence shows that the publisher entertained serious doubts as to the truth of the matter published. The discharge of this duty obviously calls for a specific inquiry into evidence showing injury in the amount of the compensatory damages awarded. The instant opinion wholly lacks any such inquiry. Moreover, even a cursory review of the record would have demonstrated that plaintiffs' evidence was fatally defective for failing to show any nexus between a general decline in revenues and the subject publications.

The requirement of independent appellate review is of particular import to the instant case because the jury was instructed that certain publications constituted libel *per se,* and that it could award compensatory damages without proof of injury. Absent the guidance of either the phrase "actual malice" or, more critically, the *St. Amant* v. *Thompson, supra,* explanation of "reckless disregard," a significant likelihood exists that the jury awarded "compensatory" damages in excess of any actual injury supported by the evidence.

This Court's reassertion of the requirement of independent appellate review in constitutional defamation cases will also serve a prophylactic function in restraining excessive experimentation to which the states might otherwise be tempted by the liberality of *Gertz* v. *Welch, supra.* If appellate courts are compelled to engage in *de novo* review, they will be forced to recognize any jury departure from the safeguards announced by this Court, and their attention will correspondingly be focused on the administrability of standards less protective than the *New York Times* test. Similarly, the requirement of *de novo* review in appellate opinions will facilitate this Court's management of its certiorari jurisdiction by enabling it to identify readily those decisions in which the command of the First Amendment has been ignored.

In summary, this Court has both broadened and narrowed the *New York Times* rule. The limitations which this Court holds the Constitution imposes on the individual states in the areas of presumed and punitive damages will not result in effective safeguards for the freedom of the press if this Court permits the Colorado supreme court to lead appellate courts of other states into discharging the constitutional duty of independent inquiry through conclusory and contentless analysis.

III. Is Defamation Liability Based on Publication of an Opinion Editorial and Opinion Letters to the Editor Consistent With This Court's Decisions Limiting Liability in Constitutional Defamation Cases to False Statements of Fact?

The instant case presents a serious threat to the public's access to the press. Under the holding of the Colorado supreme court there is grave doubt that the media can continue to discharge the crucial function of offering and stimulating comment upon matters of public concern. The decision of the Colorado supreme court, by upholding a libel judgment based on publication of an editorial and reader commentary, dangerously exceeds the leeway granted the individual states to adopt differing standards of liability for publication of *false statements of fact* concerning private individuals involved in matters of public concern. The ambit of liability established by the Colorado supreme

court, if adopted by other states, could deny the media a role in stimulating ideas through the publication of opinion.

In extending First Amendment protection to editorials and reader commentary, this Court need not depart from the direction of *Gertz* v. *Welch, supra,* by returning to the express constitutionalization of privilege. To the contrary, it need only take this occasion to reiterate that under the *Gertz* decision the states may not impose liability *without fault.* (Id., 347)

Certainly a simple negligence standard has no reasonable application to an editor's decision in selecting reader commentary for publication. Indeed, this Court has specifically denounced governmental regulation of "the choice of material to go into a newspaper." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 258 (1974). Yet the Colorado supreme court upheld a libel judgment—an obviously intimidating form of "governmental regulation"—against Woestendiek and the *Sun* because they "continue[d] to publish news articles and letters two weeks after the settlement had been made." This approach to defamation liability is both incompatible with the negligence standard suggested in *Gertz* v. *Welch, supra,* and irreconcilable with the denunciation of governmental regulation of editorial judgment in *Miami Herald Publishing Co.* v. *Tornillo, supra.*

Moreover, basing defamation liability on editorials and reader commentary is wholly inconsistent with this Court's most recent analysis of the law of libel. In *Gertz* v. *Welch, supra,* Mr. Justice Powell explained,

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. Id., 339-340.

Cf. *Old Dominion* v. *Austin, supra,* 284. Nevertheless, the Colorado supreme court fails to analyze the subject editorial and reader commentary against even the common law distinction of fact versus opinion,[4] much less this Court's repeated restriction of defamation liability to "false statements of fact." *Gertz* v. *Welch, supra,* 340. The magnitude of this error becomes more apparent upon consideration of the historic First Amendment interest in publication of opinions.

More than 50 years before this Court's holding that the First Amendment limited a publisher's defamation liability in *New York Times* v. *Sullivan, supra,* Mr. Justice Holmes recognized, as a fundamental principle of the common law, the privilege afforded comment upon matters of public concern. *Gandia* v. *Pettingill,* 222 U.S. 456 (1912).[5] Thereafter, this Court has repeatedly emphasized the identical First Amendment interest in insuring an unfettered interchange of

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[4] In light of the criticism made of the fact/opinion distinction, (see Titus, "Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment," 15 VAND. L. REV. 1203 (1962), the imposition of even this restriction on expressions of opinion would frustrate the First Amendment.

[5] Of course, letters to the editor clearly are within the ambit of the common law privilege, see, e.g., *Hrabyk* v. *Everybody's Pub. Co.,* 129 N.Y.S. 2d 273 (1954); *Howard* v. *Southern Cal. Assoc. Newspapers,* 95 Cal. Appl. 580, 213 P. 2d 399 (1950), as well as that created by the First Amendment, see, e.g., *Safarets, Inc.* v. *Gannet Company,* 80 Misc. 2d 109, 361 N.Y.S. 2d 276 (1974); *Polzin* v. *Helmbrecht,* 54 Wisc. 578, 196 N.W. 2d 685 (1972).

ideas. For example, Mr. Justice Black, in reversing a contempt conviction of a newspaper editor for an editorial critical of the judiciary, observed, "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Bridges* v. *California,* 314 U.S. 252, 270 (1941). The majority opinion in *New York Times* v. *Sullivan, supra,* leaves no doubt that the constitutional privilege there created was premised on the interest in insuring the interchange of ideas. (Id., 269-270.)

Given the compelling First Amendment interest in a vigorous exchange of ideas, the competing consideration of "the individual's right to the protection of his own good name," *Gertz* v. *Welch, supra,* 342, wholly fails to support liability for publication of editorial and reader commentary. On the one hand, opinions arise from beliefs, not facts, and the threat of liability will thereby produce only more conservative, and less stimulating, opinions, not better researched or more accurate facts. On the other hand, as the common law has recognized, statements of opinion lack the power of factual utterances to defame.[6]

If allowed to stand, the Colorado supreme court's decision can only induce other states to abuse the latitude afforded them under *Gertz* v. *Welch, supra,* by allowing the deterent of defamation liability to emasculate competition in the marketplace of ideas. *Abrams* v. *United States,* 250 U.S. 616, 630 (1919). This Court should not allow misinterpretation of its recent decision to fertilize a holding so inimical to the policies underlying the First Amendment as that which would

[6] See generally, F. Harper and F. James, *The Law of Torts* § 5.28 (1st ed. 1956).

permit defamation liability for expression of an idea, belief or opinion. Particularly after a decision such as *Gertz* v. *Welch, supra,* which expands the hazards to which publishers are exposed, the states need, and the constitution requires, reiteration of the protection which this Court has consistently afforded opinions.

In addition, the instant case affords an opportunity to defuse the lurking conflict between the free press clause and the problem of access to the media. This Court has recognized that the "liberty of the press is the right of the lonely pamphleteer . . . as much as of the large metropolitan publisher." *Branzburg* v. *Hayes,* 408 U.S. 665, 704 (1972). At the same time, it has expressed concern over the argument that, "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market." *Miami Herald Publishing Co.* v. *Tornillo, supra,* 251.

The self-censorship which results from defamation liability through decisions such as that of the Colorado supreme court seems particularly likely to extinguish the forum for opinions created by media publication of reader commentary. Where an editor in the position of Woestendiek lacks the confidence in reader opinion that he has in his own editorials, (which are often based on the investigation of his reporters), discretion is certain to be exercised in favor of caution. The outcome will be a public forum which, instead of supporting vigorous competition among diverse viewpoints, offers instead only lackluster commentary on the most pedestrian of issues to a rapidly decreasing number of readers and contributors. At the present time in Colorado the best advice a lawyer can offer

his editor-client is, "Don't publish letters to the editor at all." The accompanying exacerbation of the access problem can only speed a First Amendment crisis.[7]

In summary, this Court's attention to safeguarding the publication of editorial and reader commentary offers the individual states guidance in breaking the new ground opened by *Gertz* v. *Welch, supra,* advances the First Amendment interest in stimulating the interchange of ideas without prejudicing the protection of reputation and alleviates the conflict between the free press clause and practical monopolization of the media.

IV. Should This Court Permit the Individual States To Give Gertz v. Welch, supra, Retrospective Application?

Despite the Colorado supreme court's purported adoption of the plurality opinion in *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971), it is clear that in stripping the reckless disregard standard of its explanation in *St. Amant* v. *Thompson, supra,* the court gave retrospective application to *Gertz* v. *Welch, supra.* The Colorado supreme court thus affirmed libel judgments for material published before *Gertz* v. *Welch, supra,* was announced on the basis of a standard constitutionally impermissible but for the latitude afforded the states in that decision. This retrospective application seriously prejudices First

[7] Some commentators have suggested that because the freedoms of speech and of the press are separately numerated in the First Amendment, greater rights may attach to the latter. See Nimmer, "Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?" 26 Hastings L. J. 639 (1975). However, in contrast to the conflict implicit in *C. B. S., Inc.* v. *Democratic Nat'l. Comm.*, 412 U.S. 94 (1973), protection for publication of reader commentary furthers *both* freedom of speech and freedom of the press.

Amendment interests and finds no support among the criteria governing retrospectivity which this Court announced in *Chevron Oil Co.* v. *Huson,* 401 U.S. 97 (1971).

The Colorado supreme court's *ad hoc* relaxation of the requirements necessary to establish liability in a constitutional defamation case frustrates the First Amendment free press clause. The law of constitutional defamation has been so characterized by a state of flux that Mr. Justice Powell approved a commentator's entitling his article on *New York Times* and its progeny, "You Can't Tell the Players Without a Scorecard." *Gertz* v. *Welch, supra,* 337. Such precedential uncertainty, coupled with a lack of guidance from this Court concerning the retrospective application of constitutional defamation decisions, will itself create a strong impetus toward the self-censorship which *Gertz* v. *Welch, supra,* specifically decried. Until this Court has resolved the retrospectivity question with regard to *Gertz* v. *Welch, supra,* (and by implication decisions which may follow it), publishers' fear of financial ruin from a changed standard will curtail that "breathing space" essential to the fruitful exercise of freedom of the press. *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

Moreover, retrospective application of *Gertz* v. *Welch, supra,* cannot be reconciled with the factors set forth in *Chevron Oil Co.* v. *Huson, supra.* First, insofar as the individual states may now drastically lower the protection afforded a publisher in a constitutional defamation action from "actual malice" to simple negligence, the emergence of a new legal principle of considerable dimension cannot be contested. Second, with regard to the purpose of the new rule—protection of individual reputations—retrospective

application adds nothing to the deterrent effect of prospective application. Third, and most important, the inequities of retrospective application are manifest. Since 1968, defendants and other newspapers have justifiably believed that their publications could result in defamation liability only on a showing that they entertained serious doubts as to the truth of the matter published. *St. Amant* v. *Thompson, supra.* Now, however, unless this Court acts, publishers in many states may find themselves unavoidably exposed to financial ruin through application of plaintiff-oriented standards of defamation liability not previously promulgated.

In conclusion, the question of retrospective application merits this Court's consideration because of the significant likelihood that continued uncertainty concerning the future of the law of constitutional defamation will precipitate a chilling effect upon freedom of the press.

CONCLUSION

The decision of the Colorado supreme court affirming libel judgments against Woestendiek and the *Sun* is both inconsistent with the continued restraints imposed by the First Amendment upon the states in the area of constitutional defamation and incompatible with the First Amendment interest in actively stimulating the interchange of ideas. For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX

APPENDIX A

June 3, 1975

No. 26327

WESLEY W. WALKER and KATHERINE L. WALKER,
Plaintiffs-Appellees,

v.

THE COLORADO SPRINGS SUN, INC., WILLIAM J. WOESTENDIEK, DOYLE TRENT and SPENCER A. SIMCO,
Defendants-Appellants.

Appeal from the District Court of the County of El Paso
Honorable Hunter D. Hardeman

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS

En Banc

MR. JUSTICE GROVES delivered the opinion of the Court.

This is an appeal from a judgment entered on a verdict awarding $29,200 compensatory damages and $9,900 in exemplary damages in a libel action against the Colorado Springs Sun; its editor and publisher, William J. Woestendiek; one of its reporters, Doyle Trent; and one Simco. Simco is not here on this appeal and by using the word "defendants" we refer only to the Sun, its publisher and its reporter. We affirm as to the Sun and its editor and publisher, Woestendiek, but reverse as to the reporter. Trent.

Unless we indicate otherwise, our recitation of the facts is based upon undisputed testimony.

In late 1971, the vacant home of Mrs. Alter, an elderly widow who was living in a nursing home, was burglarized. In value, only one-third of Mrs. Alter's property was taken by the thieves. Items that were taken were sold to the plaintiffs Mr. and Mrs. Walker, who operated an antique shop under the name of "Cobweb Antiques" (called

Cobweb) in Colorado Springs. The plaintiffs bought the goods in good faith, having no knowledge of the theft or of the fact that the items were stolen goods. They paid $112.50 for the property.

Simco, a friend of Mrs. Alter, identified some of the stolen items displayed for sale at Cobweb as belonging to Mrs. Alter. Simco returned to the shop with two police officers. Mr. Walker provided the police with cancelled checks identifying the persons from whom he had purchased the goods, and removed the items from the shelves. The property was crated and a hold order placed on it by the police. Simco was told by an assistant district attorney that recovery of the goods was a civil matter between the owner of the goods and the Walkers. Simco offered $60 to the Walkers if they would release the goods to him. The offer was refused. Simco told the Walkers that they could sell the goods for $2,000, to which neither of them responded.

Simco then visited the Colorado Springs Sun (referred to as the Sun) where he told the story to the reporter, Trent. Simco told Trent, among other things, the following: that the police suggested that Simco find the goods himself; that Simco searched through all the Colorado Springs antique shop before discovering the stolen goods at Cobweb; that the thieves helped themselves to everything of value from Mrs. Alter's home; that Mrs. Alter said, "I will not pay for things that are already mine"; that neither he nor Mrs. Alter could afford a lawyer; that the Cobweb had purchased the goods for $112.50; that he offered to buy the goods back; that Walker said he stood a chance to make a good profit if he could sell the items; and that Simco had hired a lawyer but wasn't sure that he was going to ask the lawyer to pursue the matter. Simco also told Trent either (a) that the stolen goods were worth $2,000; (b) that the value of the goods was $2,000; or (c) that the Walkers had them up for sale for $2,000. Simco

told Trent that he had looked at some of the price tags. Nothing in the record supports a contemplated sale price approaching $2,000.

Several articles concerning the matter were published by the Sun. It also published some letters received from readers. These articles and letters are the bases for the libel action.

After Simco related the story to Trent, the reporter contacted Assistant District Attorney Elvin Gentry, who informed him that he was familiar with the case and that Simco had approached him and asked help in effecting the return of Mrs. Alter's goods. Gentry told Trent that he had informed Simco that, since there were no criminal charges against the Walkers, the district attorney's office could offer no help as the ownership of the goods was a civil matter; that the district attorney's office handled only criminal matters; and that it could not give advice in civil matters. A detective of the Colorado Springs Police Department confirmed that a burglary had occurred at Mrs. Alter's home and that some of the property had been identified at the Cobweb.

Trent next contacted Mrs. Walker. Mrs. Walker testified that Trent identified himself as a reporter for the Sun, told her he was calling in regard to some things taken from Mrs. Alter and asked if she knew what he was talking about. When she said "yes," he asked her if she still had the items and she again said "yes," and told him that he would have to talk with their attorney. Trent's version of the conversation varied. He testified that he told her of Simco's story and asked her if it were true; that she neither confirmed nor denied the truth of the statements, but responded by telling him to talk to their lawyer; and that he did not ask for, nor did Mrs. Walker tell him, the name of their attorney.

Trent subsequently wrote the first article which was published by the Sun on February 28, 1972 which quoted Mrs.

Alter as saying "I will not pay for things that are already mine." The article said further that the Walkers refused to return the property "even though everyone—including the police—know it is hers," that the goods represented "everything of value" in her home and that "Simco said the shop ownersw told him they paid $112.50 for items, and have priced it [sic] for resale at about $2,000."

On March 2, 1972, the Sun published an article whose authorship is not of record, which related and compared laws of several different states relating to stolen property in the hands of a third party. It spoke of "someone like Mrs. Anna Alter, currently facing such a problem." It neither mentioned the Walkers nor named their shop.

After a settlement was negotiated by attorneys representing Simco and the Walkers, Trent published an article entitled "Dealer 'Sells Back' Burglarized Goods" and stating that Mrs. Alter would recover some of the property—"but only after a second hand dealer makes a profit." It related again the difficulties encountered by Simco in trying to recover stolen property. Before this article was published, Trent contacted Mr. Walker, who told him that the $2,000 figure used in the previous article written by Trent was incorrect. Walker stated to Trent that he had purchased the goods for $112.50 and that a final settlement had been reached for $150. Walker did not tell Trent of any other possible errors, nor did he tell him that he (as Walker later testified) had increased the value of the goods to the extent of $112 by repairing and refinishing them.

In addition to the three articles mentioned, the Sun published an editorial written by defendant Woestendiek in a regularly appearing column called "Thinking Out Loud" wherein he expressed "outrage" at "what seemd to be unjust treatment given 93 year old Mrs. Anna Alter." The article repeated the story of the burglary and that the Cobweb put the goods up for sale for $2,000. Woestendiek

had received all his information from his reporters and staff, making little or no independent investigation.

Woestendiek also selected a number of letters concerning the subject and published them under a heading called "Sound Off" in which letters to the editor are printed. Woestendiek testified that he considered the opinions expressed by the writers of the letters to be of public interest; and that the focus-issue underlying all the publications, including the letters involved, was the return of stolen goods to the rightful owner.

Among the letters which were published was one printed under the heading, "Black eye for all dealers," in which the author stated that he had read of Cobweb's "preferring to resell the merchandise rather than return it to their rightful owner." Another writer expressed anger at "law used to protect the guilty and not the innocent." "A Concerned Citizen" expressed an unwillingness to do business with "a shop owner who knowingly sells stolen goods." Another letter stated that although Mr. Walker

> "undoubtedly bought these goods 'in good faith;' that is not the point. If any one can buy stolen goods and resell them, knowing they are stolen—as Mr. Walker did—then any 'fence' can do the same. . . ."

The headline above another letter read "State 'fence' paradise."

A thorough exegetic treatment of this case would involve a lengthy discussion of the law as it existed, both generally and particularly in Colorado, prior to the announcement of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 in 1964. Such an opinion would include a discussion of the extent to which we may be changing the rule of prior decisions of this court and extended reasons therefor, even though the determination here made has not been required to date by First Amendment decisions of the United States Supreme Court. We do not do so because

here our principal effort is to adopt the rule of the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 296 (1971), and rule on sufficiency of the evidence in this case under that rule. Perhaps, at a later time, when we are deciding more of the current legal questions in libel we may undertake to set forth an historical background.

New York Times Co., supra, held that the First and Fourteenth Amendments forbade a public official from recovering damages for a defamatory falsehood relating to his official conduct unless it was proved that the statement was made with "*actual malice.*" "Actual malice," as distinct from the usual legal concept of malice, was defined as arising from the publication of a statement with knowledge that it was false or with reckless disregard for whether it was true or not. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), applied the same rule to "public figures."[1] In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971), a plurality, but not a majority, of the Supreme Court applied the *New York Times Co.* and *Butts* rule to a defamatory statement made about a private individual when an "event of public or general concern" is involved. In dissenting in *Rosenbloom,* Mr. Justice Harlan would have applied a standard of simple negligence.

This case was at issue here and on April 15, 1974 we heard oral arguments. Before we had announced any opinion, the United States Supreme Court on June 24, 1974 decided *Gertz* v. *Robert Welch, Inc.*, ——U.S.——, 94 S. Ct. 2997, 41 L. Ed. 2d 789, reversing a district court judgment and a circuit court affirmation thereof, and ordering a new trial in the light of the views expressed by the majority.

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[1] Mr. Justice Harlan, writing for the majority, indicated that "public figures" are those who "commanded a substantial amount of independent public interest at the time of the publications." 388 U.S. at 154.

Gertz had brought a libel action in the United States District Court. Prior to and during the trial the judge did not apply the *New York Times* rule. The jury awarded $50,000 to Gertz. Thereafter, just six months prior to the announcement of *Rosenbloom,* the trial court entered judgment for the defendant n.o.v. *Gertz* v. *Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970).

We quote the facts from Gertz from Mr. Justice Powell's majority opinion:

> "In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.
>
> "Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March of 1969 respondent published the resulting article under the title 'FRAME-UP: Richard Nuccio And The War On Police.' The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the communist campaign against the police.
>
> "In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine

portrayed him as an architect of the 'frame-up.' According to the article, the police file on petitioner took 'a big, Irish cop to lift.' The article stated that petitioner had been an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.' It labelled Gertz a 'Leninist' and a 'Communist-fronter.' It also stated that Gertz had been an officer of the National Lawyers Guild, described as a communist organization that 'probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic convention.'

"These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a 'Leninist' or a 'Communist-fronter.' And he had never been a member of the 'Marxist League for Industrial Democracy' or the 'Intercollegiate Socialist Society.'

"The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had 'concluded extensive research into the Richard Nuccio case.' And he included in the article a photograph of petitioner and wrote the caption that appeared under it: 'Elmer Gertz of the Red Guild harrasses [sic] Nuccio.' Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago."

Further quoting from *Gertz:*

"Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standards should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict."

As mentioned, the Court of Appeals affirmed. *Gertz* v. *Robert Welch, Inc.,* 471 F.2d 801 (7th Cir. 1972).

In reversing the circuit court the United States Supreme Court said:

"We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

On July 17, 1974, no opinion having issued here, we ordered that counsel file simultaneous briefs within sixty days on the following points:

"1. In the light of the U. S. Supreme Court decision in *Gertz* v. *Robert Welch, Inc.,* decided June 25, 1974, 42 Law Week 5123, what is the appropriate standard of liability that Colorado should adopt for a publisher or broadcaster of defamatory falsehoods injurious to a private individual?

"2. Should there be a different standard of liability upon publications of matters of general or public concern than if the matter has no public interest or public concern, and if so, what should be the standards for each?

"3. If this Court should decide not to require the actual malice test for liability, but should instead lay down a less stringent rule for liability, should this rule be retroactively applied, if so, in what manner?

"4. In the light of the above questions, if this court should determine that actual malice was lacking in this case as a matter of law, what should be the disposition of this case?"

Thereafter, briefs were filed by the parties, as well as by the Colorado Press Association as *amicus curiae.* We

heard further oral arguments in the light of *Gertz* on November 19, 1974.

We are asked to—and we herein—pronounce the standard of liability for a publisher or broadcaster of defamatory falsehood which is injurious to a private individual and which relates to an event of public general concern. On the one hand, the defendants ask that we apply the plurality standard of *Rosenbloom*. In contrast, the plaintiffs request us to rule that the Colorado standard in such cases will be that of simple negligence, *i.e.*, to follow the dissent of Mr. Justice Harlan in *Rosenbloom*. With a limitation made later herein, we adopt the standard of the plurality in *Rosenbloom;* rule that the court correctly instructed the jury as to the standard of liability; and hold that the evidence was sufficient to support the verdicts.

It might be said that, under the result reached here, we need not adopt one or the other of the suggested standards. We feel, however, that the bench, the bar and the public are entitled *now* to an announcement of the rule in Colorado on this point.

The gate has been opened by *Gertz*. We find *Gertz* slightly enigmatic in that it permits us to rule—as we do here rule—contrary to some of the opinions expressed therein. *Gertz* does not follow, and appears to disapprove of, the rule stated above in *Rosenbloom*. This thought is predicated in part upon the following language in *Gertz:*

> "For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or

> public interest' and which do not—to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions."

In *Gertz* the majority appears to favor a simple negligence standard in cases not involving a public official or public figure. At least, it indicates that such a standard is permissible in discussing exemplary damages: ". . . punitive damages are wholly irrelevant to the state interest that justifies a negligent standard for private defamation actions."

In the instant case, the plaintiffs admittedly were neither public officials nor public figures. The trial court found that the subject involved was a matter of public interest and concern. We agree. It followed *Rosenbloom,* except that in its instruction the term "actual malice" was not used. Instruction No. 2, after advising the jury that some of the publications were libelous per se, read:

"You are instructed, however, that under the law a newspaper and its staff . . . are privileged to publish even defamatory material concerning an individual, provided such privilege is not abused. The privilege is abused only if the Plaintiffs establish that the publications were false in some material manner and such statements were published with knowledge that they were false or with reckless disregard of whether they were false or not."

I

As already stated, we are asked by the plaintiffs to adopt a rule of simple negligence as the standard of liability under which the publisher of a defamatory statement against a private individual may be held liable, if the matter involves an event of public or general concern. In such matters the defendants request that we adopt the rule of *Rosenbloom*.

Insofar as we are advised, this is the first opinion by a state court of last resort under *Gertz*. Speaking for the majority of the Court of Appeals of Indiana, Third District, Judge Staton wrote *AAFCO Heating and Air Conditioning Company* v. *Northwest Publications. Inc.*, — Ind. Ct. App. —, 321 N.E.2d 580 (announced December 30, 1974). The majority there (2 to 1) came to substantially the same result as the majority of this court, although in making its determination it relied in some part upon a state constitutional provision. Parenthetically, for the uninitiated who seek expositions upon the backgrounds and issues of the subject, we suggest they start with the excellent discussions in *Gertz* and *AAFCO*.

The "reckless disregard" portion of "actual malice" under the *New York Times* test was the subject of further explanation or definition in *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). As we read *St. Amant*, it says virtually that in order for there to be a finding of reckless disregard of the truth, there "must be sufficient evidence to permit the conclusion that

the defendant in fact entertained serious doubts as to the truth of his publication." The plurality in *Rosenbloom* followed this statement from *St. Amant*.

In adopting the rule of *Rosenbloom*, we do so with the limitation that "reckless disregard" for whether or not a statement is true does not mean that there must be a finding that the person making the statement had serious doubts as to the truth thereof. In short, we adopt *Rosenbloom*, but without the stated explanation or definition made by *St. Amant* as to "reckless disregard."

We hold that, when a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.

The *St. Amant* statement of "serious doubts" as a test of "reckless disregard" has merit in that it gives a more concrete guideline to a jury with respect to "reckless disregard." However, the consensus of the majority of our court is that we should not approve the *St. Amant* definition at this time, since the term "reckless disregard" has had rather frequent usage in the tort field in this state.[2]

The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Under the Fourteenth Amendment, this

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[2] *Cantrell* v. *Forest City Publishing Co.*, — U.S. —, — S. Ct. —, — L. Ed. 2d — was announced on December 18, 1974, about six months following the announcement of *Gertz*. This affirmed the trial court wherein the judgment had been granted to private individuals for libel. It quotes the trial judge's instruction as follows: "Recklessness implies a higher degree of culpability than negligence. Recklessly means wantonly, with indifference to consequences." It appears from this that the *St. Amant* definition was not used.

applies to the states. *Gitlow* v. *New York,* 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). We recognize that there is no perfect rule to be promulgated which will balance the conflict between the First Amendment right of the press and the injury sustained by a person defamed, more particularly when that person is a *private individual* involved in a subject of public or general concern. Our ruling here results simply from our conclusion that a simple negligence rule would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions; and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation-injured private individual. We quote from Judge Staton in *AAFCO:*

> "The United States Supreme Court recognized in *New York Times Co.* v. *Sullivan, supra,* that a rule requiring the media to guarantee the truth of its news reporting would lead to self-censorship. Publishers, fearful of being unable to prove the truth of their statements, would avoid the publication of controversial articles. We refuse to adopt a rule that would allow private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care. Such a rule would promote self-censorship by causing publishers to 'steer far wider of the unlawful zone.' *Speiser* v. *Randall* (1958), 357 U.S. 513, 536. The uncertainty attendant upon a reasonable care standard would charge the press with 'the untolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.' *Time, Inc.* v. *Hill, supra,* 385 U.S. at 389. A publisher's fear of guessing wrong about juror assessment of the reasonableness of the news gathering procedures he employs would inevitably deter 'protected' speech. Furthermore, the standard of proof employed in libel actions heightens the risk of self-censorship inherent in a 'reasonable care' standard of media privilege."

In *Rosenbloom* it was observed that "the vagueness of the negligence standard itself would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." From *St. Amant:* "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protects some erroneous publications as well as true ones." From *Gertz:* "The First Amendment requires that we protect some falsehood in order to protect speech that matters."

II

We hold that the evidence was insufficient to support a finding of reckless disregard or knowledge of falsity on the part of Trent. Before writing his story Trent investigated what Simco had told him. He contacted the Assistant District Attorney and a detective for the Colorado Springs Police Department who both verified the substance of Simco's story. Further, Trent called Mrs. Walker who did not tell him anything to cause him to disbelieve the story. Only after this investigation did he report what he had good reason to believe was the truth of the matter. Additionally, only one statement was unsupported by the evidence—that the goods had been priced for $2,000.

Under these circumstances, we cannot find evidence to support the jury's finding that Trent recklessly disregarded the truth.

III

We hold that the evidence sufficiently supports a finding of publication of statements by the defendants, Sun and Woestendiek, with *reckless disregard* as to whether they were true (as to compensatory damages), and, with a wanton or *reckless disregard of the rights and feelings of the plaintiffs* (as to exemplary damages).

The following are some of the items of evidence from which the jury could conclude that the defendants, Sun

and Woestendiek, did act recklessly in the sense involved both as to compensatory damages and punitive damages: entitling a published letter, "Black eye for all dealers," which letter stated that the Walkers preferred to resell the articles rather than return them to the rightful owners; publishing letters expressing anger at the law being used to protect the guilty and not the innocent; publishing an opinion that the writer was thoroughly amazed that the plaintiffs would even consider selling merchandise known to be stolen; headlining a letter "State 'fence' paradise"; publishing an opinion that the writer would not do business with one who knowingly sells stolen property; and continuing to publish news articles and letters two weeks after the settlement had been made.

There was sufficient basis for the finding of reckless disregard on the part of Woestendiek and the Sun in the publication of the defamatory letters. Although a publisher can assume the truth of facts contained in his reporters' stories, *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), this cannot apply to the publication of the letters. Woestendiek—and only Woestendiek—selected the letters to be published. This supports the jury's verdict as to Woestendiek and, of course, the Sun.

New York Times and *Rosenbloom* hold that First Amendment questions of constitutional fact compel an appellate court's de novo review, and that liability must be supported with convincing clarity. This is not a case, however, for us to become a thirteenth juror. We believe there was convincing clarity to the evidence presented by and on behalf of the plaintiff. *See Cantrell* v. *Forest City Publishing Co., supra,* as cited in footnote 2 hereof.

We have gone quite a great distance in this opinion to protect the public media under the First Amendment. Under the facts of this case, the right of free press does not compel or justify us in finding as a matter of law that the

plaintiffs did not prove their case against Woestendiek and the Sun as to both types of damages.

IV

We anticipate the issue: Is the determination that a matter is of public interest or concern a question of law for the court or a question of fact for the jury? We rule that it is a question of law for the court. In doing so, we are not unmindful of the difficulties engendered as above set forth by Mr. Justice Powell in *Gertz.* The cases which we have read either hold or assume that this is a question of law for the court. This was the assumption in *Gertz. Firestone* v. *Time, Inc.,* 271 So.2d 745 (Fla. 1972) specifically so held.

V

The trial court, we think, wisely did not use the term "actual malice" in the instructions. As stated above, this was a term used to designate a constitutional standard in *New York Times.* This use of "actual malice" is entirely different from common-law "malice." Because of the possibility of confusion of meanings the trial judge eliminated "actual malice" from the instructions, mentioning Mr. Justice Brennan's footnote [9] in *Rosenbloom.* As indicated, we entirely agree with the trial judge and think that it would not be good practice to use the term "actual malice" in instructions in future cases.

VI

The defendants have argued that a demand to the publisher for retraction of an allegedly false statement should be a condition precedent to the commencement of an action for libel. *Colorado Jury Instructions* 22:15 provides for consideration of retraction in mitigation of damages. We have concluded that whether a demand for retraction should become a condition precedent to the filing of an action is more properly within the legislative ambit than

the subject of initial judicial purview. For an example of statutes making such provision, *see Kapellas* v. *Kofman*, 1 Cal.3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969); and *AAFCO, supra*. We therefore, do not rule upon whether a demand for retraction should be a condition precedent.

VII

We have been asked to hold that it is no longer necessary to maintain the distinction between libel *per se* and libel *per quod*. This question, as with others that have been presented in this case, we reserve for decision in some other case at some later date.

Judgment affirmed in part and reversed in part, and cause remanded with directions to vacate the judgment against Trent and dismiss the complaint as to him.

MR. JUSTICE ERICKSON and MR. JUSTICE LEE *specially concur in part and dissent in part.*

MR. JUSTICE ERICKSON *specially concurring in part and dissenting in part*:

I would affirm the trial court on the issue of liability with respect to all defendants, but I would adopt a negligence standard and not the "reckless disregard" test. When this case was tried, *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), had not been decided. In the *Gertz* case, the Supreme Court reevaluated the constitutional limitations on civil actions for defamation and held that although public figures and public officials must prove recklessness to recover in defamation suits against the news media, private individuals need only prove negligence. The only proscription which the Supreme Court imposed upon the states in the *Gertz* case was that recovery for false, defamatory statements could no longer be predicated on strict liability and punitive damages could not be awarded in the absence of a showing of knowledge of falsity or reckless disregard for the truth. The record more than

supports the jury's verdict when viewed from the standpoint of negligence, and the award for punitive damages was predicated on evidence and instructions which meet the test of recklessness. Moreover, the instructions in this case are a credit to the trial judge and were fashioned with the limitations imposed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 34 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny in mind. *Accord, Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

The majority opinion in this case relies upon *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), as authority for saddling the citizens of Colorado with a prohibition against recovery for false, defamatory publications, when the proof falls short of the "reckless disregard" standard announced in *New York Times Co.* v. *Sullivan, supra*, and *Curtis Publishing Co.* v. *Butts, supra*. *Rosenbloom* was a plurality opinion written by Mr. Justice Brennan, and concurred in by the Chief Justice and Mr. Justice Blackmun, which had little vitality when it was announced and even less today. *Symposium—First Amendment and the Media*, 26 Hastings L. J. No. 3 (1975); Brosnahan, *From Times* v. *Sullivan to Gertz* v. *Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 Hastings L. J. 777 (1975); *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 139-148 (1974). *See* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 Supreme Court Review 267; Note, 40 Ford L. Rev. 651 (1972). Both *Rosenbloom* and *Gertz* focused on the issue of whether the knowing or reckless falsity standard applies to a defamation action brought by a private citizen when the defamatory statements relate to "an event of public or general interest." Mr. Justice Harlan dissented in *Rosenbloom* and applied a negligence standard. His dissent was adopted in the majority opinion in the *Gertz* case written by Mr. Justice Powell and reflects the standard which Colorado should follow, in my opinion.

The quagmire of confusion that has been created by the intervention of the Supreme Court of the United States into the law of libel and slander on a constitutional plane is regrettable. In *Gertz,* Mr. Justice Powell acknowledged that "this court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." In a separate concurring opinion in *Gertz,* Mr. Justice Blackmun set forth the reasons for his change in position and decried the fact that the Supreme Court was so sadly fractionated in the *Rosenbloom* opinion. In recognizing the need of striking a balance between the competing values which are admittedly in issue, Mr. Justice Blackmun joined the majority of the court in *Gertz* to reach a definitive ruling and certainty in the law of defamation.[1]

It is impossible to suggest that the facts in *Rosenbloom* are sufficiently different to cause the court, on a factual

[1] The majority opinion was written by Mr. Justice Powell, and was concurred in by Mr. Justices [sic] Stewart, Marshall, and Rehnquist. Mr. Justice Blackmun wrote a separate concurring opinion. Mr. Justice Douglas and Mr. Justice Brennan voted to affirm the court of appeals and deny recovery. Mr. Justice Douglas restated his view that the First and Fourteenth Amendments make all state libel laws unconstitutional. Mr. Justice Brennan reiterated his view that all discussions of public issues should be protected by the knowing or reckless falsehood statute. Mr. Chief Justice Burger and Mr. Justice White dissented and voted to reinstate the verdict in favor of Gertz, which was based on a strict liability standard. The Chief Justice emphasized the public policy of shielding lawyers from the publicity surrounding unpopular cases. Mr. Justice White pointed out the importance of keeping federalism on a proper level and decried the court's wholesale remaking of state tort law, electing to reinstate strict liability to protect private citizens from defamatory publications, which is a pronounced departure from the standard which he announced for a divided court in *St. Amant* v. *Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Insofar as *Gertz* is parallel to *Rosenbloom,* three Justices can be said to have switched their votes in the intervening period: Mr. Justice Blackmun, Mr. Justice White, and the Chief Justice.

basis, to come to a different conclusion in *Gertz* than in *Rosenbloom.* False, defamatory statements by the news media involving a private citizen provided the foundation for the decision in both cases.

To put this court's dilemma in proper perspective, it is necessary to review the facts in the *Gertz* case. Elmer Gertz brought a civil damage action for the family of a youth who was slain by Nuccio, a Chicago policeman. Nuccio had been convicted of second-degree murder. Gertz had nothing to do with the criminal prosecution. However, *American Opinion,* a journal expressing the views of The John Birch Society, viewed Nuccio's conviction as part of a nationwide plot to discredit local police forces and published an article charging that the prosecution was a frame-up engineered and planned by Gertz. The article also, among other allegations, referred to Gertz as a "Leninist" and as a "Communist fronter."[2]

There was no truthful basis for the charges in the *Gertz* case. As a result, Gertz filed a libel action in the federal court on the basis of diversity of citizenship. The jury returned a verdict under a strict liability charge for $50,000. Thereafter, the trial court granted a defense motion for judgment notwithstanding the verdict on the ground that the plaintiff, although not a public figure, was prohibited from recovery because the article involved a public issue. The trial court concluded that the First Amendment barred recovery in the absence of a showing of falsity or reckless disregard for the truth and said that the evidence

[2] The district court held that under Illinois law an untruthful charge of being a Communist was libelous per se. In addition, since it would harm a lawyer in his profession, it was libelous per se because it would be slanderous per se. *Gertz* v. *Robert Welch, Inc.,* 306 F.Supp. 310 (N.D. Ill. 1969). The trial court also held that since the defamation was libelous per se, there was no need for the plaintiff to plead or prove special damages or actual pecuniary loss. *See generally W. Prosser, The Law of Torts* § 112 (4th ed. 1971).

might show negligence, but would not support a finding of recklessness. The court of appeals affirmed the trial court. *Gertz* v. *Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

Although Chief Justice Burger and Mr. Justice White voted to reinstate the verdict in favor of Gertz, the majority, speaking through Mr. Justice Powell, concluded that the *New York Times* standard was not applicable and that the trial court erred in entering judgment for the defendant. A new trial was ordered because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury.

Gertz v. *Robert Welch, Inc.* stands for the following propositions: First, that the recklessness standard of liability must be applied, as a matter of constitutional law, when public officials or public figures assert that they have been subjected to a defamatory publication. Second, even for the defamation of a private individual, the states are not at liberty to impose strict liability upon the news media, but may protect a private individual by imposing any standard of care except liability without fault. Third, punitive or presumed damages can be recovered, regardless of whether the plaintiff is a public or private figure, only if recklessness is established. Damages, however, under the negligence concept enunciated in *Gertz,* are limited to actual injury, which may encompass all normal tort damages, including humiliation and suffering.

Thus, with *Gertz* as the best lighthouse which is available to guide us through the constitutional fog, we review the Colorado Constitution for further guidance. Article II, Section 10 of the Colorado Constitution buttresses implementation of Harlan's negligence standard in libel cases of this type and states:

> "*Freedom of speech and press.*—No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

The Colorado Constitution not only guarantees free speech and a free press, but also fixes responsibility for abuse. *See Cooper* v. *People ex rel. Wyatt,* 13 Colo. 337, 22 P. 790, 6 L.R.A. 430 (1889); Campbell, *Libel as a Limitation on Newspaper Publications,* 25 Rocky Mtn. L. Rev. 279 (1953); Van Cise, *The Law of Libel in Colorado,* 28 Dicta 121 (1951).

The citizens of Colorado have a cherished and historic right to redress for damages caused by false and defamatory publications. Laws of Colorado (1861) p. 35; 2 Mills Ann. Stat. § 1889 (1926); *Byers* v. *Martin,* 2 Colo. 605, 25 Am. Rep. 755 (1875). Colorado's proprietary right to protect its citizenry from libelous abuse was recognized in the *Gertz* case by quoting from Mr. Justice Potter Stewart's opinion in *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 S.Ct. 669 15 L.Ed.2d 597 (966). In *Rosenblatt,* the right of an individual to protection of his own good name was said to reflect:

> "[N]o more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

The genesis of the law of defamation was strict liability. *W. Prosser, The Law of Torts* 773 (4th ed. 1971); *Restatement of Torts* § 559 (1938); 1 *Harper and James, The Law of Torts* § 5.1, at 349-350 (1956); Veeder, *The History and Theory of the Law of Defamation,* 3 Colum. L. Rev. 546 (1903). However, the evolution of the law of defamation has watered down the strict liability concept. *But see* the dissenting opinions of Mr. Chief Justice Burger and Mr.

Justice White in *Gertz* v. *Robert Welch, Inc., supra,* which approve of the strict liability standard.

It is necessary to balance the unrestricted right to publish matters of public interest against the right of an individual to be protected against negligently published false and defamatory statements. The right of the public to know has the corollary that the right to know includes the right to know the truth. No license should exist to publish false, defamatory statements. The Supreme Court, although recognizing the publishing business as falling within the ambit of the First Amendment, has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander.

Our founders, in creating three branches of government, deliberately created an internally competitive system. As Mr. Justice Brandeis said in *Myers* v. *United States,* 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (dissenting opinion): "The [founders'] purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the government as an additional check on the three official branches. Moreover, the three governmental branches are subject to checks and balances, and the imposition of a standard of reasonable care on the news media does not restrict the freedom of the press, but only encourages good journalistic practice and professionalism. *See* Colorado Press Association Code of Ethics.

Mr. Justice White, in his concurring opinion in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. , 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), said:

> "The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

> "'In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise . . . .
>
> "'. . . . Without . . . a lively sense of responsibility a free press may readily become a powerful instrument of injustice.'" Pennekamp v. Florida, 328 U.S. 331, 356, 365, 66 S.Ct. 1029, 1042, 90 L.Ed. 1295 (1946). (Frankfurter, J., concurring) (footnote omitted).

Accountability and liberty are not mutually exclusive.

> "Accountability, like subjection of law, is not necessarily a net subtraction from liberty . . . . The First Amendment was intended to guarantee free expression not to create a privileged industry." Commission on Freedom of the Press, A Free and Responsible Press 130 (1947).

As Mr. Justice Harlan said in *Rosenbloom* v. *Metromedia, Inc., supra*:

> "I think we all agree on certain core propositions. First, as a general matter, the States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens. Secondly, there is no identifiable value worthy of constitutional protection in the publication of falsehoods. Third, although libel law provides that truth is a complete defense, that principle, standing alone, is insufficient to satisfy the constitutional interest in freedom of speech and press. For we have recognized that it is inevitable that there will be 'some error in the situation presented in free debate.' Time, Inc. v. Hill, 385 U.S. 374, 406, 87 S.Ct. 534, 551, 17 L.Ed.2d 456 (1967) (opinion of this writer), a process that needs 'breathing space,' NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), to flourish, and that 'putting to the preexisting prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.' Time, Inc. v. Hill, *supra*, at 406, 87 S.Ct. at 551."

A responsible and professional new media requires no greater protection than that afforded by the negligence test. Mr. Justice Harlan, in his *Rosenbloom* dissent, which set forth a standard which was approved by five members of the Court in *Gertz,* and disassproved by two members of the Court as being contrary to the recognized strict liability concept, reasoned as follows:

> "To begin, it does no violence, in my judgment, to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise these freedoms. I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. Additionally, the burden of acting reasonably in taking action that may produce adverse consequences for others is one generally placed upon all in our society. Thus, history itself belies the argument that a speaker must somehow be freed of the ordinary constraints of acting with reasonable care in order to contribute to the public good while, for example, doctors, accountants, and architects have constantly performed within such bounds."

The dissent of Mr. Justice Harlan also offers the following logic for the negligence test:

> "[W]here the purpose and effect of the law are to redress actual and measurable injury to private individuals that was reasonably foreseeable as a result of the publication, there is no necessary conflict with the values of freedom speech. Just as an automobile negligently driven can cost a person his physical and mental wellbeing and the fruits of his labor, so can a printing press negligently set. While the First Amendment protects the press from the imposition of special liabilities upon it, '[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee.' Curtis Publishing Co. v. Butts, 388 U.S. 130, 160, 87 S.Ct. 1975, 1994, 18 L.Ed.2d 1094 (1967) (opinion of this writer). A business 'is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). That the damage has been inflicted by words rather than other instrumentalities cannot insulate it from liability. States may legitimately be required to use finer regulatory tools where dealing with 'speech,' but they are not wholly disabled from exacting compensation for its measurable adverse consequences. If this is not so, it is difficult to understand why governments may, for example, proscribe 'misleading' advertising practices or specify what is 'true' in the dissemination of consumer credit advertisements."

The clash in this case is between the right of the news media to report matters of general interest and the right of private individual to maintain a reputation unsullied by false and defamatory comments by the news media. When these interests are in conflict, the courts must balance both interests and endeavor to reach an accommodation. The failing which is evident in the majority opinion is that the *Rosenbloom* test does not achieve a balance or an accommodation. The majority opinion fully implements the interest of the press, but does not take the private citizen's interest into account. The recklessness standard which the majority has adopted may require a plaintiff in a libel action, where matters of public interest are involved, to establish that the news media had a conscious awareness of probable falsity if recovery is to be allowed, even though the majority has elected not to follow *St. Amant* v. *Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), which was reaffirmed in *Gertz.* Reckless disregard as a standard, when stripped of the interpretation afforded by *St. Amant* v. *Thompson, supra,* probably means gross negligence, but certainly does not provide a settled test. *See Coffman* v.

Godsoe, 142 Colo. 575, 351 P.2d 808 (1960); *Fanstiel v. Wright,* 122 Colo. 451, 222 P.2d 1001 (1950).

As I view the issue, the public official or public figure stands on an entirely different level than the involuntary news figure—the private citizen—who is defamed in a publication because the news media deems a matter to be of public interest. The private citizen has no opportunity to rebut the false charge in any effective way. It is doubtful that a retraction would reach the same group that heard or saw the initial publication, because retractions tend to have less meaning and are printed with less fervor than the initial news release. A reasonable balance between the right of the news media under the First Amendment and the right of the private citizen is the negligence test. In my view, the law of Colorado should not be so radically changed by this court from a concept of strict liability, in cases of this type, to a standard that, in effect, establishes no liability for a private citizen who is defamed by the news media.

The First Amendment should not be read as a license for irresponsibility by the news media. By reason of the services rendered by the news media, a defeasible privilege is granted when public officials or public figures are involved, but the reasons for such a privilege cease to exist when a private citizen is involved. To extend the privilege granted the news media in their dealings with public officials or public figures to private citizens, who are captured by the news potential of their private experiences, is to create a fundamental unfairness.

The distinction which the majority has made and the definition of a matter of public interest or general concern is such that a definition is impossible, and implementation of the standard will only result in the destruction of a private citizen's right to recover for damages which he has suffered at the hands of the news media. The remedy of a libel action is the sole practical recourse which a private

citizen has to secure an accounting for false and defamatory statements which are published. Even a libel action, the single arrow in a citizen's quiver, is of attenuated efficacy, as Professor Thomas I. Emerson points out:

> "The impact of libel laws on the system of free expression has also been limited by the practical obstacles to maintaining a successful suit. Litigation is likely to be protracted. Delay is sure. Results are uncertain. Damages are speculative. Attitudes of judges, lawyers and the public all tend to be unfavorable." Emerson, The System of Freedom of Expression (1970), p. 519.

Experience with libel actions has taught us that the plaintiff is always on a perilous course. He exposes himself to accelerated vituperation and public exposure when he attempts to vindicate and protect his sullied reputation. In this case, the editor published material provided by the reporter and published stories relating to the litigation, rehashed the contents of the original stories, and pointed out the service that the defendant had rendered to the community in exposing the acts committed by the plaintiff. The public interest generated by the media in this case catapulted a local incident into the republication of the same allegations in a national antique magazine.

Mr. Justice Lee authorizes me to say that he joins me in this specially concurring and dissenting opinion.

STATE OF COLORADO, *ss.*

IN THE SUPREME COURT THEREOF.

THE PEOPLE OF THE STATE OF COLORADO,

To the District Court of El Paso County and State of Colorado, Greeting:

WHEREAS, lately in the District Court of El Paso County State aforesaid, in a certain cause therein pending between *Wesley W. Walker* and *Katherine L. Walker, Plaintiffs,* and *The Colorado Springs Sun, Inc., et al., Defendants,* the

judgment of said District Court in said cause rendered was against the said defendants.

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, as an appeal from said District Court.

AND WHEREAS, at the April 1 Term of our Supreme Court, in the year of our Lord one thousand nine hundred and seventy-five, the said cause came on to be heard before our said SUPREME COURT on the 17th day of March, A.D. 1975, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

No. 26327

WESLEY W. WALKER and KATHERINE L. WALKER,
Plaintiffs-Appellees,

v.

THE COLORADO SPRINGS SUN, INC., WILLIAM J. WOESTENDIEK, DOYLE TRENT and SPENCER A. SIMCO,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT

EL PASO COUNTY

(68704)

This cause having been brought to this court as an appeal to review the judgment of the District Court of El Paso County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, the court now being sufficiently advised in the premises, it is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby affirmed in part and reversed in part in conformity with the conclusions announced in the opinion of the court filed herein, and this cause be

remanded to said District Court with directions to vacate the judgment against Trent and dismiss the complaint as to him, and for further proceedings in harmony with the opinion of the court on file.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said El Paso County and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE EDWARD E. PRINGLE, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 2nd day of June, A. D. 1975.

RICHARD D. TURELLI,
Richard D. Turelli,
Clerk Supreme Court.

/s/ By: FLORENCE WALSH
Florence Walsh
Deputy.

APPENDIX B

Exhibit B-1

February 28, 1972

VICTIM REFUSES TO PAY FOR PILFERED ANTIQUES

By DOYLE TRENT
Sun Staff Writer

"I will not pay for things that are already mine," a 93-year-old theft victim said recently.

But unless she has the energy or the money or both to pursue her stolen property through a maze of legal hocus-pocus, she may have to do just that.

Meanwhile, her belongings collect dust in an antique shop where the thieves sold it, even though everyone—including the police—know it is hers.

The woman, Mrs. Anna Alter, is a resident of the Lakeside Nursing Home, 1182 Fountain Blvd., but she still owns her home at 2036 W. Uintah St.

A friend, Spencer A. Simco, 505 Swope Ave., is looking after the house for her, and it is Simco who is trying to recover the stolen property.

"She left the house neat and clean," said Simco. "Now it's a mess."

He said thieves crawled under the house sometime between Nov. 29 and Dec. 3 and chopped a hole through the floor, then helped themselves to everything of value.

Simco, who said he became a friend of Mrs. Alter's when he was doing yard work for her, began searching the pawn and antique shops.

On Dec. 12 he found some of the stolen goods in the Cobweb antique shop, 2624 W. Colorado Ave.

Four AWOL soldiers from Ft. Carson became the prime suspects.

Five soldiers had rented a house next door to Mrs. Alter's One was still in the house when police obtained a search warrant and discovered more of the stolen property. He is facing action in the criminal courts. The four are still being sought.

But locating the stolen goods was only the beginning of the battle to recover it.

The old adage that possession is two-thirds of the law appears to hold true in actual legal practice.

The antique shop still has the goods and the District Attorney's office said it may take a civil suit to force the owner to hand it over.

Elvin Gentry, assistant district attorney, said his office placed a hold order on the property as evidence in a criminal matter.

Then pictures of it were taken, and the pictures can be used as evidence instead of the goods, Gentry said.

So Friday the hold order was removed.

"The antique dealer bought the property in good faith," said Gentry. "There are no criminal charges against him or Simco.

"So now it is a civil matter between two individuals."

The district attorney's office handles only criminal matters, and cannot give advice on civil law. Simco was advised to hire a lawyer and begin the process of recovering the property through the civil courts. His only alternative is to bargain with the shop owners.

"Mrs. Alter can't afford a lawyer," said Simco, "and neither can I. Even if she could get free legal help, she is not strong enough to do anything about it. And I have no power of attorney; I'm not her legal guardian."

Simco said the shop owners told him they paid $112.50 for the items, and have priced it for resale at about $2,000.

"I offered to give them half what they paid for it," Simco said, "and they refused. I can't offer any more than that."

One of the owners, Mrs. Wesley Walker, said: "Our lawyer is taking care of it. I can't do anything for him."

Simco, a delivery truck driver, said he has taken time off from his job to try to recover Mrs. Alter's property, but he has no more time to spare.

"I used to take her to her home on Sunday's for a Sunday dinner," he said. "But I can't do that now. If she walked in there and saw her house the way those thieves left it she'd have a heart attack."

It was Simco who first got wise to the identity of the hoodlums. He said they left a trail in their progress

through some bushes which separate the two houses, and they dropped one of Mrs. Alter's books on the trail.

The name of the book is "Pilgrim's Progress."

Exhibit B-2

DA DEFENDS STOLEN PROPERTY RULES

March 2, 1972

The district attorney said Wednesday he doesn't much like the fact that an antique dealer can keep stolen property until ownership is determined in a civil action, but added he is afraid a law that forces him to give it back on demand might be more harmful.

"No one wants to see a law where the police can confiscate property before ownership is etsablished," said Robert L. Russel. "Who knows whose it really is?"

Right now the district attorney can take no action unless the shop owner knows the property is stolen when he accepts it. The only recourse for someone like Mrs. Anna Alter, currently facing such a problem, is to file a civil action.

A survey of five neighboring states indicates only two have the same problem.

The attorneys general of Arizona and New Mexico said recovery of the property would have to await court action on a civil suit.

In Wyoming, Oklahoma and Utah, legal officers said the property would be returned to the original after the thief was convicted.

Police Chief Oren Beling says he has "never liked the regulation" that allows the property to remain with the shop owner. "I think the responsibility should rest with the pawn shop."

Should someone like Mrs. Alter walk into the shop and leave with her property, would she be prosecuted?

Asst. Dist. Atty. William Hybl said he couldn't answer such a hypothetical question.

"We would have to examine the individual case. She does have civil recovery available to her, and we never advocate self help."

In Mrs. Alter's case, it's rather a moot question. At 93 she is not likely to take the law into her own hands. A Welfare Department caseworker has contacted Legal Services, and that agency is looking into the matter.

Meanwhile the police department and the Exchange Club have been studying the entire problem, and are about to launch a project aimed toward prevention.

The project, called "Operation Identification," will be an effort to induce everyone to etch an identifying number, such as a social security number on each piece of valuable personal property.

The program was started in Monterey Park, Calif., and according to the Wall Street Journal, has dramatically curtailed burglaries.

Paul Burke, president of the Exchange Club, said ideally the participants could make a list of their property and numbers for the police department to keep on file.

How etching tools would be made available to the public is a detail the club is now working out. Burke said he hopes the project could begin in about six weeks.

Boling said he is in favor of the program, while admitting there are some drawbacks. One is, unless the etching were nonremovable, the criminal could replace it with one of his own.

About 150 communities now have the program in operation, according to information the chief has.

Exhibit B-3

DEALER 'SELLS BACK' BURGLARIZED GOODS

March 4, 1972

Mrs. Anna Alter, 93, will recover some of the property stolen in a burglary at her home—but only after a second hand dealer makes a profit.

Mrs. Alter's home at 2020 W. Uintah was burglarized between Nov. 20 and Dec. 3 by thieves who chopped a hole through the floor.

A friend, Spencer A. Simco, 505 W. Swope Ave., located some of the stolen goods in the Cobweb antique shop, 2624 W. Colorado Ave.

The property was first ordered held in the store as evidence in a criminal case. Warrants were issued by the police department for five men. Two were arrested and three are being sought.

Then pictures were taken of the goods, and the district attorney's office said the pictures could be used as evidence instead of the stolen property.

The hold order was lifted.

Simco tried to get the property back for his elderly friend, who is a patient in a nursing home. The antique dealer would not relinquish it.

He went to the district attorney's office for help and was told that since the dealer bought the goods in good faith and there was no criminal charge against him, the district attorney's office could not order him to give it up.

Simco was advised to seek redress through the civil courts in the same manner as a person seeking to recover a debt or to repossess mortgaged property.

But Simco said Mrs. Alter is too frail to participate in court litigation, and he decided to try to bargain with the antique dealer.

He offered half what the dealer paid for the property. He was refused. He hired a lawyer. Nothing happened. He went back to the dealer and made another offer. It too was refused.

Late Thursday Simco went back to the dealer again and offered $150 for the goods. That offer was accepted.

The dealer, Wesley Walker, told The SUN he paid $112.50 for the property. He verified that Simco paid him $150 for its return.

"We might have been able to get it back through the courts," said Simco, "but Mrs. Alter's age kept us from pursuing it further.

"I told him (Walker) I was paying for it grudgingly but under the circumstances we had no choice."

Exhibit B-4

THINKING OUT LOUD

By Bill Woestendiek

Friday, March 3, 1972

AS YOU KNOW, I was as outraged as most of our readers last week by what seemed to be the unjust treatment given 93-year-old Mrs. Anna Alter.

Mrs. Alter's home was broken into by thieves who took everythig of value. The thieves were caught, but not until after they had sold the goods to a local antique shop, The Cobweb. The thieves sold the goods for $112.50. The antique dealer then put them up for sale for $2,000—and refused to return them to their rightful owner, Mrs. Alter.

That refusal was upheld by our District Attorney's office, which said that Mrs. Alter would have to go to court if she wanted to get back her own property.

Bugged by that, we had a SUN reporter, as you read yesterday, check with attorneys general from some other states to see what their reactions were. This is what we found out bearing in mind that all of the attorneys emphasized that the full particulars of the case would have to be known before they could make a fully accurate assessment, since there seems to be a thin line between civil and criminal proceedings in this area:

UTAH: "They (the antique store, or pawn shop) don't have the right to purchase stolen property, even unknowingly, since the thief has no title to the property. The purchaser buys at his peril and the property would be awarded to the original owner after the thieves had been convicted."

Arizona: "She (the original owner) would have to pursue it civilly; there's no automatic way of recovering the property. She would have to establish her ownership in a civil suit. Fruit of the crime concept does not apply in this case."

New Mexico: "High probability she'd have to go to a civil suit. Fruit of the crime concept does not apply."

Wyoming: "Offhand I'd say that ordinarily the judge would order the property returned to the original owner at the closing of the criminal suit. Fruit of crime concept applies.

Oklahoma. "Fruit of the crime concept applies. It would be taken into custody as evidence and returned to the original owner at the end of the criminal proceedings."

I'd say that Oklahoma, Wyoming and Utah laws make a lot more sense than ours in this instance.

The Colorado Attorney General's office contended that "she'd have to go to court; that they'd have to make a judicial determination of ownership, (called a replevin suit). It said possession is nine-tenths of the law. (To which I'd say: ridiculous.)

Our police chief, Oren Boling, says he has "never liked the regulation" that allows the property to remain with the shop owner. "I think the responsibility should rest with the shop."

So do most of us. It just does not make good sense that anyone should have to buy back, or go to court to fight for, property that belongs to him or her. Surely, as Utah, Oklahoma, and Wyoming laws prove, something can be done to change this unacceptable and unjust situation.

Happily, Our Police department and the Exchange Club are planning to launch a project called "Operation Identification," an effort to get everyone to etch an identifying number on each piece of valuable personal property.

As reported in The Wall Street Journal "Operation Identification" is a voluntary program that a growing number of local police groups and service clubs are sponsoring. They lend individual citizens electric engraving instruments and the borrowers use them to etch an identifying mark, usually a driver's license number, on anything from TV sets to jewelry.

When police find stolen goods, they plug the number into a computer and the owner is identified. The system seems to be detering burglars dramatically in some cities where it is in use.

I think it's a fine idea. The Exchange Club and our police department deserve credit for planning to start it here. Anything that will help get stolen goods back to their rightful owner deserves the support of all of us.

Exhibit B-5

SOUND OFF!
BLACK EYE FOR ALL DEALERS

March 7, 1972

I recently read an article in The SUN concerning the theft of Mrs. Alter's property and how Cobweb Antique Shop purchased the stolen goods; preferring to resell the merchandise rather than returning them to their rightful owner.

As an antique dealer, I know that one can unknowingly purchase stolen merchandise, however, I am thoroughly amazed that the Cobweb would even consider selling merchandise that is known to be stolen.

If the Cobweb does in fact resell these items before the entire episode is cleared up, it can only serve to give them and every antique dealer in town a black eye.

I can understand that the Cobweb doesn't want to be left "holding the bag" for $112.50, but since they were offered ½ of the price they paid for these items, I would think the remaining $56.25 is a small price to pay to keep such unwanted publicity out of the newspaper.

Every antique dealer should bear in mind that some day it may be their merchandise that gets stolen and give some serious thought as to how they would like to be treated in that situation.

In closing, I can only say that there is something wrong with a law which doesn't allow stolen property to be returned to the rightful owners, provided they can prove it belongs to them.

Rick Grove

Exhibit B-6

March 13, 1972

STOLEN PROPERTY LAWS

I support the view expressed by Mr. Woestendick in Thinking Out Loud recently regarding the matter of stolen property wholeheartedly. It makes me very angry when I see the laws, used to protect the guilty and not the innocent.

It seems to me that such a matter comes under the laws governing the receiving of stolen property. In the case some years ago of persons buying cars that were stolen, even though the buyer did not know and had no reason to suspect that they were stolen, the buyer was out the car. In the case of forged checks the depositor is protected and the bank is responsible. Banks carry insurance against such a loss. How many people in this country have been convicted of the crime of receiving stolen property? The laws are clear. No one is allowed to profit from the proceeds of theft, either knowing or not. Why then, does the D.A.'s office use the flimsy and obviously immoral defense for failing to help a 93-year old woman? With this kind of justice it is no wonder that the youth of the country is up in arms about the "establishment." The D.A.'s office should be searching for a way to protect Mrs. Alter, not the antique dealer. (I would not like to go to sleep each night with the knowledge that I was wronging a 93-year old woman.)

Name withheld

TRAGIC SITUATION

What tragedy a private citizen must, at his own expense, reclaim his own property after the police have "done their job."

After spending 22 years in Alaska, I had only heard once of such a crazy idea. An old sourdough my family has known for years obtained many things which he never hid

nor felt the least bit guilty about. When he was confronted by the owners of these articles, he would say "possession is nine-tenths of the law," and refuse to give them up.

We all knew this old man as a former resident of Colorado and thought because of his age maybe his mind was going! Crazy idea? No! Here, it is legal!

Many are concerned with the question of weapons. Arm or disarm the private citizen, weapons in the home, crime rate, etc. Seems to be on many minds according to the Sound Off column. We have many loopholes for lawbreakers to crawl through to escape punishment and responsibility. This is only one reason I feel a homeowner must protect his home from within.

I, for one, don't want to see something stolen from me on sale in a local shop. Neither will I do business with a shop owner who knowingly sells stolen goods!

A concerned resident

ARCHAIC STATUTE

Rick Grove's letter re: the Alter property and the Cobweb Antique Shop was most apropo.

No one denies the right of a merchant to make a legitimate profit on his wares, but these circumstances most certainly alter cases. In most states, the old principle of "coneat [sic] emptor" applies.

The primary issue here, as I see it, is the Colorado statute on the disposition of stolen goods, which to me, seems archaic.

Also the attitude of the proprietor of the Cobweb Shop leaves a little to be desired—which, of course, does not alter the legal status of this claim.

I trust that Mr. Grove, and other reputable merchants in the field, shall not have to suffer from this but I can say in all heart that the Cobweb Shop will lose my patronage.

Jeanne J. Moser

Exhibit B-7

SOUND OFF!

March 17, 1972

WIDE IMPLICATIONS

The fact that Mr. Walker sold the second-hand goods stolen from Mrs. Alter has wide implications. He undoubtedly bought these goods "in good faith"; that is not the point.

If anyone can buy stolen goods and resell them, knowing they are stolen—as Mr. Walker did—then any "fence" can do the same, simply by claiming he bought them "in good faith." In that case, no one's valuables are safe from irrevocable loss if they are stolen. I wonder how insurance companies view this concept?

I await with interest what interpretation of law Mr. Walker and our noble District Attorney will apply if and when property belonging (at present) to them is stolen and sold to some secondhand dealer. I'll bet the law will take on some new aspects—without any amendment!

Maynard R. Snell

STATE 'FENCE' PARADISE

Sorry to say, but in the underworld lingo, the man that bought those stolen goods would be called a "fence." So, if we do not have an amendment to the law we have now, this place can become a good place for it to develop as big time racket. I wonder now if my car gets stolen if that law applies to it since I do not recall if it mentions a difference in what kinds of goods the dealer could buy without a bill of sale or proof of ownership.

I wonder, too, if a person is injured or hurt in the process of stealing, if they can turn around and file suit to the owner of the place.

Ridiculous, but it happened in another state. Woe to them that call evil good and good evil.

R.F.

Exhibit B-8

Monday, March 20

A DIFFERENT ANGLE

In the case of the property allegedly stolen from the 93-year-old woman, and afterwards found in an antique shop, was the identification challenged: The implication that the recovery and return of stolen property is not a normal police function is disturbing indeed. You are to be congratulated on your public service in publicizing cases like this.

But, what I am really writing about, is to ask that somebody take a look, from a different angle, at our laws and the enforcement thereof. How would it have been if the shoe had been on the other foot? Just suppose:

Mr. Jones, a private citizen, puts up signs advertising a garage sale. An antique dealer drops by, and recognizes property stolen from his own store. Mr. Jones' story is straight-forward enough. Mr. Jones was the one who learned about these antiques from a chance acquaintance she met at the supermarket. The chance acquaintance and her husband came to the Jones' home that evening. They have a trailer loaded with things, they are taking west from their old home in Indiana. They have had some unusual expense due to unexpected car trouble, and they might be willing to part with some of their treasure in order to get money to continue their journey.

Mr. Jones is hestitant. He isn't sure he wants any of these things. On the other hand, he has an out: He has been thinking about having a garage sale anyway. He might buy a few things, and then decide later whether to keep them or sell them. He would like to help these travelers, but he mustn't pay too much. He ends up selecting a few things, for this he pays $112.50 in cash, and he receives a written receipt and a bill of sale.

Now what happens? Somehow, I have grim visions of Mr. Jones being arrested for receiving stolen property. He is taken to the police station, mugged, and fingerprinted. At a preliminary hearing, the antique dealer swears that he had this merchandise marked to sell for $2,000. At $112.50, one didn't have to be an antique dealer: anybody at all would have known right away that it was stolen property. The judge explains to Mr. Jones that he is entitled to be represented by an attorney, and tells him the maximum fine and maximum prison sentence that may be imposed on him if he is found guilty of being a fence.

The judge asks him if he is ready to plea, and Mr. Jones says, "What in the world is this all about? You know perfectly well I'm not guilty." The judge cautions him to watch his language, enters for him a plea of not guilty, orders the police to seize the property and to return it to the rightful owner, orders Jones held under $2,000 bond, and cautions him that the burden of proof will rest heavily upon him since he has been caught redhanded. A friendly bondsman, for a $200 premium, gets Jones out of jail. The case drags on. Jones is ordered into court over and over again, but the antique dealer is too busy to come in and testify, and the prosecution continues to get continuances. Finally, Mr. Jones, is told that he can end all this nuisance, and get off with a suspended sentence, if he will just plead guilty.

Now, I wouldn't believe, without proof, that anything so raw as the above bit of fiction could happen in El Paso County, but what would happen?

And by the way, a 93-year-old woman in a nursing home has no business carrying any of the responsibility whatever of caring for real estate. If neighbors have been kind enough to do things for her, they should, for their own protection as well as hers, get some kind of court order.

Warren Jewet.